STATE OF MICHIGAN

COURT OF APPEALS

JANE L. MILLHISLER, and
DAVID MILLHISLER,

Plaintiffs-Appellants,

v

ALEX M. MANZONI, D.V.M. P.C., and
ALEX M. MANZONI, D.V.M.,

Defendants-Appellees.

UNPUBLISHED
September 8, 2005

No. 253559
Saginaw Circuit Court
LC No. 03-047265-NO

Before: Whitbeck, C.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

In this premises liability action, plaintiffs Jane and David Millhisler[1] appeal as of right from the trial court order granting the motion of defendants Alex M. Manzoni, D.V.M. P.C. and Alex M. Manzoni, D.V.M. (collectively, Manzoni) for summary disposition under MCR 2.116(C)(10). We affirm. We decide this case without oral argument under MCR 7.214(E).

I. Basic Facts And Procedural History

On April 2, 2002, Millhisler took her dogs, "Murphy" and "Blondie," to a veterinary clinic operated by defendants. Millhisler testified that Murphy had previously fractured his leg and was in for a follow-up exam. After the exam, according to Millhisler, Murphy ran from the examination room toward the waiting area. Millhisler ran after Murphy, fearful that he could be reinjured. As she followed Murphy, Millhisler passed Carol Schaffer, an employee of Manzoni, who was carrying a mop in the opposite direction. Schaffer testified that she had just completed mopping up after a dog that had relieved itself in the waiting area. Millhisler testified that "when I saw Carol with the mop, I think I said to myself, oh, my gosh, I wonder if that floor is wet out there. Is she [Murphy] going to fall and reinjure her leg." As Millhisler neared the front desk area, she slipped and fell. Millhisler testified that she was looking at the floor as she hurried after the dog but did not observe that it was obviously wet, slippery, or damp. According to Millhisler, after she fell she noticed that the floor was wet when she felt dampness on her hand.

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[1] Throughout this opinion, the name "Millhisler" will refer to Jane Millhisler.

Nicole Mayer, an employee of Manzoni, testified that she did not see Millhisler fall but came into the waiting area immediately thereafter. Mayer testified that she did not see any standing water or debris where Millhisler had fallen. Similarly, Rachelle Owens, another employee of Manzoni who helped Millhisler immediately after the accident, also testified that she did not observe a wet spot or debris on the floor where Millhisler fell. Both Mayer and Owens testified that they could not tell what caused Millhisler to fall.

Schaffer, who had mopped up after the dog relieved itself, testified that there were no puddles on the floor in the waiting area after she completed mopping, commenting that if there were, she "would have dried them right up." Mayer testified that she could see a wet area on the floor where Schaffer had mopped, but she indicated that this wet area was approximately four feet away from where Millhisler fell. Similarly, Owens testified that she could see a wet area on the floor where Schaffer had mopped about three feet away from where Millhisler fell.

Manzoni filed a motion for summary disposition pursuant to MCR 2.116(C)(10) on the ground that the slippery condition on the floor was open and obvious. After hearing oral arguments and taking the matter under advisement, the trial court granted Manzoni's motion to dismiss, stating in pertinent part:

> In this case, the plaintiff alleges specifically in paragraph seven of her Complaint that she "slipped and fell on an unmarked wet floor which had just been mopped by the agents or employees of the defendant Manzoni."
>
> However, in response to the defendant's [sic] motion, the plaintiff argues that she did not slip in the exact area that was mopped, and the defendant's [sic] have failed to present "any evidence that the floor was wet much less that such wetness was open and obvious."
>
> In review of the file, however, this Court notes the deposition testimony of Nicole Mayer where she testified that an employee had, in fact, mopped and also the testimony of the plaintiff where she testified that she saw the lady with the mop and wondered if the floor might be wet.
>
> Regardless of whether the plaintiff slipped on the floor that had just been mopped, or in an area where the mop had been carried through, it is not unreasonable to conclude that the plaintiff would not have been injured had she been watching the area in which she was running.
>
> It is the conclusion of the Court that the flooring inside the clinic was open and obvious upon casual inspection, and the defendant's [sic] motion is granted.

Plaintiffs filed a motion for reconsideration that the trial court denied and this appeal followed.

II. Summary Disposition

A. Standard Of Review

We review de novo a trial court's decision on a motion for summary disposition.[2] The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered in the light most favorable to the nonmoving party.[3] A genuine issue of material fact exists when the record leaves open an issue on which reasonable minds could differ.[4] When the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law.[5]

B. Legal Standards

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages.[6] Because Millhisler was on defendants' premises for commercial purposes, she was a business invitee.[7] An owner owes a duty to an invitee to exercise reasonable care to protect the invitee from unreasonable risk of harm caused by a dangerous condition on the land.[8] This duty does not encompass open and obvious dangers unless special aspects of the condition make the risk unreasonably dangerous.[9] The determination whether an alleged dangerous condition is open and obvious focuses on the characteristics of a reasonably prudent person.[10] The test is whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented on casual inspection.[11]

C. The Existence Of A Duty

As noted, an owner owes a duty to an invitee to exercise reasonable care to protect the invitee from unreasonable risk of harm caused by a dangerous condition on the land.[12] We first

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[2] *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

[3] *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

[4] *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

[5] *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

[6] *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

[7] *Stitt v Holland Abundant life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000).

[8] *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001).

[9] *Id*.

[10] *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329 n 10; 683 NW2d 573 (2004).

[11] *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002).

[12] *Lugo*, *supra* at 516.

observe that, as a matter of law, there is some considerable doubt as to whether the floor on which Millhisler slipped was in fact hazardous. Certainly, it did not *appear* hazardous; as plaintiffs say in their brief, "[T]here was no testimony from anyone that the floor where Ms. Millhisler fell appeared wet (or unsafe)."[13]

We are aware of no precedent for the proposition that a dry floor, without more, presents a dangerous condition on the land or constitutes a hazard. Thus, the only circumstance that might lead to a conclusion that such a dangerous condition or hazard existed is one in which the floor was wet or damp. There is no evidence that the floor was wet. The *only* evidence that it was damp was Millhisler's testimony that, after she fell, she "felt dampness on my hand." This is a thin reed indeed upon which to premise a conclusion that the floor in the waiting area on which Millhisler slipped was a dangerous condition on the land or a hazard sufficient to trigger a duty running from Manzoni to Millhisler, or a conclusion that Manzoni breached that duty. Rather, plaintiffs' reasoning seems to be that since Millhisler slipped and fell, the floor must *ipso facto* have been a dangerous condition on the land or a hazard. We conclude that this approach, without more, was insufficient to survive a motion for summary disposition.

D. The Open And Obvious Doctrine

Assuming, however, that there was a duty, however derived, and that Manzoni breached that duty, the question remains whether the condition of the allegedly damp floor on which Millhisler slipped was open and obvious. We agree with the trial court that it was. We note that Millhisler testified that it was not obvious to her, before she fell, that the floor was wet, damp, or slippery. However, the test is not what was obvious to Millhisler; the test is whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented on casual inspection.[14]

We conclude that an average user—particularly if that user had previous seen an employee with a mop returning from the waiting area and if that user had then consciously wondered if the floor in that area was wet and whether her dog was about to fall and reinjure her leg—would have been able to discover the danger and the risk presented by the floor in the waiting area, if any, on casual inspection.[15]

E. Notice

We note that there is no evidence that the floor in the waiting area was marked with cones, a sign, or any other instrument designed to put a person on notice that a hazard existed. However, there is also no evidence that Manzoni was on actual or constructive notice of a hazardous condition in the waiting area. Indeed, Shaffer testified that had she noticed any

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[13] Emphasis in the original.

[14] See *Rubin*, *supra* at 238.

[15] As an aside, we also agree with the trial court's conclusion that Millhisler "would not have been injured had she been watching the area in which she was running."

puddles after she had completed mopping, she would have dried them up. Plaintiffs have presented no evidence as to how "dampness" on the floor where Millhisler slipped got there or how long it had been present. There are no facts from which it can be inferred that Manzoni had actual or constructive notice of any alleged defect in the building, including "dampness" on the waiting room floor. Plaintiffs have therefore failed to carry their burden of showing that a genuine issue of disputed fact existed.[16]

F. Amendment Of The Complaint

Plaintiffs argue that they should have been allowed to amend their complaint under MCR 2.116(1)(5). However, as Manzoni notes, plaintiffs never sought leave to amend their complaint after filing a supplemental brief after oral argument before the trial court and in spite of filing a motion for reconsideration after the trial court's ruling. In any event, given our conclusion on the notice issue, any amendment to the complaint would be futile.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald

[16] *Pete v Iron Co*, 192 Mich App 687, 689-690; 481 NW2d 731 (1991).